

Ist INDO-FRENCH LEGAL FORUM MEET

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Intellectual property rights-such as copyrights, patents, trademarks, and so on-offer the legal protection upon which authors, inventors, firms, researchers, and others rely to protect their creations. Intellectual property rights dictate what use can legally be made of the creative work, and are thus essential to ensuring that authors are rewarded for their efforts.

Over the past few years, intellectual property litigation has become high profile. Witness the publicity surrounding the Napster case [A & M Records, Inc. v. Napster, Inc (239 F.3d at 1004)], Amazon.com's litigation on its one-click business method patent [Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343 (Fed. Cir. 2001)], the constitutional challenge to the Sonny Bono Copyright Term Extension Act before the Supreme Court [Eldred v. Reno, (239 F.3d 372, D.C. Cir. 2001)], and the movie studios' efforts to enjoin individuals and entities from posting the crack to the DVD Content Scrambling System on the Internet. In another case, when Research In Motion (RIM), the suppliers of the Blackberry phones, settled with NTP for \$ 612.5 million, the share price of RIM rose. Earlier this year, Viacom sued Google for \$ 1 Billion for copyright violation caused due to the video sharing website, YouTube. Thus, all these cases support a growing belief that intellectual

property law is the key component of the globalized world, allowing for corporations to enforce their property rights internationally and that the globalized future is built upon the strong protection of intellectual property law.

In the past, intellectual property was still inextricably bound with physical property. For example, one could write a story-the words and expressions of which constitute intellectual property-but the story still had to manifest itself in the physical guise of a book-a form of chattel. Consequently, enforcement of intellectual property rights could be achieved through the enforcement of physical property rights. However, with the advent of the digital era, traditional methods of legal enforcement, which largely relied upon expression of an idea that was physical in form, no longer possess the efficacy they once did.

As a result of the increasing divergence between material and intellectual property, a distinctly negative case against intellectual property enforcement emerges. Creators of intellectual property face tremendous problems in enforcing legal prohibitions against piracy in an era characterized by two dominant features. First, with the advent of digital technology and the separation of intellectual property from its physical expression, information can now flow freely from one end of the planet to another with minimal expense and effort. At the same time, there is no robust international intellectual property regime to help contain violations of intellectual property rights. These two aspects of the contemporary information economy combine to render intellectual property laws less meaningful than ever

before.

However, despite some success, the modern intellectual property regime has not proven entirely effectual in many areas of the economy. The rise of new technologies such as the CD burner, mp3 compression, and broadband Internet access has enabled ordinary people to circumvent intellectual property laws like never before. Consequently, litigation seeking to enforce intellectual property rights has burgeoned in recent years.

At the same time, however, the advent of digital fingerprinting and increasingly effective Internet search engines could reduce the costs of detecting intellectual property infringement. Use of secured networks, digital fences, and code on the Internet will help ensure the protection of intellectual property in the coming years, perhaps even to a level so high that it becomes socially undesirable by robbing the public domain of important informational content. For example, the creators of information databases as the online Encyclopedia Britannica have relied on such technical protections, including encryption techniques, to protect their information and derive economic gain from the sale of its access through their own secured, trusted system.

Furthermore, the tenuous nature of national social consensus on intellectual property rights was recently demonstrated in the wake of the Anthrax threat that hit the United States. The leading treatment for Anthrax is Cipro, a drug for which Bayer, the German biotechnology conglomerate, owns the patent rights. Within days of the first Anthrax

casualties, Senator Charles Schumer of New York suggested that the government should circumvent the patent rights for Cipro, thereby enabling it to obtain Cipro quickly at virtually no charge. In Canada, the government overrode the Cipro patent to facilitate the ordering of almost one million tablets of a generic version of the drug to fill gaps in the national stockpile. Such actions were particularly ironic given the support that western governments lent to thirty-nine pharmaceutical companies in their suit against the government of South Africa for patent infringement of HIV drugs.

Moreover, the use of the Internet for delivery of goods and services and the retail sales of tangible items is also on the rise, and if the current trend continues, information technology and electronic commerce can be expected to drive economic growth for many years to come. Cost savings, increased consumer choice, and improved customer convenience are stimulating the expansion of the Internet retail sector. Advances in information and communications technologies have significantly improved the ease with which products or art forms can be created, reproduced, and disseminated. Trade on the Internet is thus equally attractive to consumers and suppliers. For the former, it is fast and convenient; for the latter, it reduces overhead costs at every stage, from production through sale and delivery. In *Sony v. Universal Studios* [*Sony Corp. of America v. University City Studios, Inc.*, 464 U.S. 417 (1984)], the US Supreme Court held that arguing that consumers are entitled under fair use rights to the practice of time-shifting and noting that the existence of potential infringing uses for a technology should not render that technology illegal per se.

The French courts have issued an injunction against any auctioning of Nazi goods by Yahoo! [LICRA & EUJF v. Yahoo! Inc., (Interim Court Order No. 00/05308, 00/05309)]. However, when domestic public policies clash with international court rulings, especially in high profile issues, international court rulings rarely win: in the Yahoo! case, the French injunction has been rendered meaningless by the refusal of American courts, on First Amendment grounds, to enforce the ruling [Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d [1181 \(N.D. Cal. 2001\)](#)].

Balancing Knowledge with Rights:

Universal access to knowledge is the greatest benefit of the digital economy. Once digitized, any piece of information or any author's work can be made available to anyone, anywhere, at anytime. But the concept of universal accessibility challenges some of the foundational premises of intellectual property protection. As a result of the ease with which digital property can be modified, copied, and distributed, longstanding legal and practical assumptions about protecting ownership, guaranteeing authenticity, and balancing the rights of owners and users may no longer apply.

The easy access to content protected by intellectual property laws was brought to new heights with the popularization of MP3 and the music exchange program Napster. Napster was immediately sued by the music industry. However, peer-to-peer networking and the availability of MP3

formats, CD burners, and portable MP3 players made it possible for musicians to use the Internet to market and distribute music directly to their fans without having to sign exploitative contracts.

The dominant issue today is defining what constitutes “intellectual property.” On the one hand, America and Europe believe in affording a creator near-absolute protection for a set amount of time during which he is free to capitalize on his creative work product. On the other hand, others (like the Chinese) believe that knowledge of the past is indispensable for personal moral growth, which necessitates that there is unfettered access to “common heritage”.

It is clear that drastic change in science and technology has made the world a different place than it was twenty-five years ago. The tension between ownership of rights and exchange of knowledge is inherent in the laws of intellectual property.

Issues in Copyright Law:

A basic premise of copyright law is to encourage creativity by recognizing a property right in the works of authorship. In effect, a copyright is a property that should be respected as any other property right.

The advent of the Internet, however, has raised a new and unexpected challenge, making it more difficult to reach a balance, and has fostered an extremely protective environment

where works are considered similar to physical properties, with rights-holders accorded extensive control over them. At the same time, digital technologies allow perfect, inexpensive, and unlimited copying and dissemination of content. The advent of cyberspace and the digital revolution have rendered branding and its intellectual property analogue-trademark-more important and valuable than ever, especially vis-a-vis copyright. This is particularly true now that copyrighted content can be reproduced with such ease, scale, and low cost.

United States copyright protection has its origin in Article I of the Constitution, which grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....”

Applicable Law:

Berne Convention: This treaty provides a basic framework with which member states must comply through domestic laws. The Berne Convention, along with eighteen other treaties addressing international intellectual property, operate under the oversight of the WIPO. The most prominent deficiency in the WIPO is its failure to provide for adequate enforcement of the treaties that it oversees. The dissatisfaction with the WIPO’s inability to enforce was addressed in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs agreement).

The TRIPs Agreement: The TRIPs agreement was a result of concern among developed countries, who lobbied heavily for protection against piracy of intellectual property. A main objective of TRIPs is equitable treatment. Moreover, TRIPs provides for a dispute settlement mechanism that previous international conventions were lacking. However, one of the weaknesses of TRIPS is its ambiguity. Owing to its nature as an enforceable international consensus on IPRs, its terms are somewhat vague. Relevant to this discussion is TRIPS Article 41(5), which places no obligations upon WTO member nations to “put in place a judicial system for the enforcement of [IPRs] distinct from that for the enforcement of law in general.” The Article goes on to say that “[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of [IPRs] and the enforcement of law in general.” In other words, Article 41(5) broadly permits states to continue operating their existing enforcement mechanisms, no matter how inadequate. This “no resource required” provision presents a problem as it lets a country get away with poor copyright enforcement by claiming inadequate resources while continuing to enjoy the benefits of WTO membership.

WIPO Treaties: The WIPO recognized the potential for international copyright infringement in the Internet age when it enacted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in 1996.

WIPO Copyright Treaty: The WIPO Copyright Treaty builds upon the Berne Convention, and brings into the Internet

age computer programs that have been considered literary. Signatories are required to provide legal protection to copyright holders whose rights have been infringed via technological circumvention. Missing from the Copyright Treaty is an enforcement provision that is consistent with TRIPs. The Copyright Treaty merely requires that each signatory adopt necessary measures to ensure the treaty's application and to prevent infringement. This seems to be inconsistent with TRIPs enforcement guidelines, since domestic standards in each signatory country can be different.

Performances and Phonograms Treaty: The WIPO Performances and Phonograms Treaty recognized the importance of protecting sound recordings in the Internet era. Prior to this treaty, no major international agreement protected phonographic rights beyond that of reproduction. Because of the Phonogram Treaty, protected rights have been expanded to include the right of public distribution, rental right, and the right to make works available to the public. For example, under applicable law and in accordance with industry practices, a record company would need an artist's permission to distribute his CD to the public, rent it to the public, or transmit the sound recording to the public over the Internet. In addition to the above rights, the Phonograms Treaty protects a performer's moral rights, economic right in unfixed performances, and right to make fixed performances available.

The U.S. Digital Millennium Copyright Act (DMCA): The goal of the DMCA is to protect copyright in the digital era. It implements both the WIPO Copyright Treaty and the WIPO

Performances and Phonograms Treaty; updates the current copyright laws to reflect the Internet age; and outlaws the manufacture of devices or software designed to circumvent security measures created for the Internet. Prior to the signing of the DMCA, the law did not prohibit devices that were designed specifically to penetrate encryption codes that a copyright holder may have established. In addition to incorporating the two international treaties, the DMCA addresses the area of the Internet Service Providers (ISPs).

Issues Arising Due to Transnational Intellectual Property Infringement:

Extraterritoriality: Infringements that cross national boundaries bring with them the question of jurisdiction; whether a particular forum is convenient to hear the issue; and choice of law issues. In the U.S., for example, Courts have consistently held that U.S. copyright law does not apply beyond U.S. territorial boundaries. This view was recently reiterated in *Subafilms, Ltd. v. MGM-Pathe Communications, Co.* [24 F.3d 1088 (9th Cir. 1994)]. Moreover, extraterritorial application of a nation's intellectual property laws could render the treaties' principles meaningless. Also, extraterritorial application would frustrate the minimum rights principle which recognizes that domestic laws will differ, and grants individual countries the authority to afford right holders more rights than the minimum standard. This right of individual countries would be frustrated if other countries were to apply their laws extraterritorially.

Jurisdiction: A common problem facing participants in international actions is one of proper jurisdiction. U.S. courts commonly employ the standard of minimum contacts to exercise jurisdiction over a defendant. Through this standard, state courts have been able to exercise jurisdiction over an individual not present in the forum if the individual has established minimum contacts with the forum. In *Maritz v. Cybergold* [947 F. Supp. 1328 (E.D. Mo. 1996)], Inc., the court held that Cybergold consciously decided to transmit advertising information to all Internet users, knowing that the information would be transmitted globally.

Convenient Forum: The Internet has transcended traditional jurisdictional boundaries. It allows for almost instantaneous copyright infringement in multiple countries. As a result, a right holder can have a claim in multiple forums. In such cases, the doctrine of *forum non conveniens* is often used. In *Piper v. Reyno* [454 U.S. 235 (1981)], the Supreme Court created the forum non conveniens test that must be examined in international cases. The Court used a two-prong analysis, first determining whether an adequate alternative forum exists, and, if one does exist, then balancing a series of interests.

The forum non conveniens doctrine was invoked to dismiss an international copyright infringement claim in *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney* [934 F. Supp. 119 S.D.N.Y. (1996)] (the “Fantasia case”). The plaintiff brought copyright infringement claims against the defendant that occurred in eighteen different countries when Disney released

Fantasia on video. The district court dismissed the action on forum non conveniens grounds. On appeal, the Second Circuit reversed the dismissal, finding that the district court did not properly apply the first prong of the Piper test. However, the appellate court did not decide whether the district court needed to determine whether there was one single forum that must have jurisdiction over all eighteen claims.

The outcome of the Fantasia case poses a problem in the Internet age. In a situation where a copyright has been infringed, twenty separate foreign courts would satisfy the alternative forum prong of the Piper test. For practical purposes, however, it is highly unlikely that a plaintiff will be willing to expend the costs of litigating in eighteen different foreign courts.

Choice of Law: Further complicating the issue is the determination of the law to be applied. The same choice of law rule has been incorporated into the Berne Convention for cinematographic works, which provides that copyright protection “shall be governed exclusively by the laws of the country where protection is claimed.” (Art 5(2)). However, the Internet raises concerns over the applicability of traditional principles. A single use of a copyrighted work might lead to effects in multiple countries. As inconsistent standards of protection persist among copyright laws, problems are certain to occur when works are internationally exploited. It is apparent that uniform standards of copyright law would severely minimize the choice of law problem.

The Internet will almost certainly make these problems even more prevalent, as a single keystroke is crossing multiple

national boundaries. However, as we have seen in the copyright treaties, these provide only a minimum level of protection for right holders. Treaty language permits domestic law to provide greater protection. Consequently, copyright law around the world is not uniform.

Fair Use Doctrine: This doctrine allows a user limited use of copyright protected material without the prior permission of the copyright holder. Such a use is usually availed when a work is copied for scholastic or review purposes. However the limits of this doctrine are blurred in the digital medium. One example is the issue of hyperlink.

Hyperlinks:

The copy with respect to hyperlink is the URL link of the website. Here, it is unlikely that the URL may be considered copyright protected, and in any case, the URL is probably not created by the copyright holder. However, the proponents of the view that such a hyperlink does infringe copyright argue that if a hyperlink were to be replaced by a copyrighted graphical or textual reference, then the same would be infringing. Since the hyperlink is an indirect representation of such copyrighted references, the hyperlink must be copyright. This view has been questioned by the 9th Circuit Court of Appeals in the case of *Kelly v. Arriba Soft Corporation* [336 F3d 811 (9C 2003)], where thumbnail pictured and inline linking from the plaintiff's website in Arriba's search engine were not considered a violation of the plaintiff's copyright. However, the law is far from settled in this area.

Database Protection:

The question that arises for debate, with regard to protection of databases is that whether the tools which do the work of compilation are themselves inventive products? This question gives rise to a number of practical questions that have legal significance. Where does ownership reside? Does it reside with the original collector of the data, the individual who conceived of the new combination, the inventor of the search tools, or some combination of them? And what of the people to whom data pertain? A database might even contain trade secret material. As more and more data goes online, as our tools become more advanced, and as digital property becomes an ever-larger component of our collective wealth, issues like these will only become more vexing. In the Supreme Court's 1991 decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* [499 U.S. 340 (1991)], the Court, while rejecting copyright protection for a white-pages telephone directory, held that requiring subsequent users to duplicate the original compiler's effort was exactly backwards: far from demanding redundant effort, copyright law - by denying protection to isolated facts and ideas - sought to discourage it. Henceforth, copyright protection would depend upon the quality of the compiler's work: "originality, not 'sweat of the brow', is the touchstone of copyright protection in directories and other fact-based works." However, the Feist Court did leave open the possibility that unoriginal effort alone might be eligible for legal protection other than copyright. However, we still know very

little about the principles to be applied to computerized databases.

Patent Law and its Enforcement:

In the patent world, business process patents became controversial when Amazon.com patented the one-click process for buying something off the Web. Furthermore, the Human Genome Project completed a basic map of the human genome ahead of schedule. The Human Genome Project has led to a dramatic increase in the number of patents filed on parts of the human genetic code and has led some scholars to suggest that the human gene is “under colonization.” Despite the ethical issues, the European Union agreed at the end of the 1990s to allow patents on life forms, including the human genome.

In the case of RIM v. NTP (Research In Motion, Ltd. v. NTP, Inc., Supreme Court No. 05-763), the enforcement issue comes to fore. In 2000, NTP brought an action against RIM and brought an action against them in the Eastern District of Virginia for infringing NTP’s wireless email patents [NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005)]. RIM argued that the subject matter claimed by NTP’s patent was in public domain. During discovery, it was revealed that the technology used by RIM in its blackberry phones was a modern version and thus RIM’s evidence was disregarded. In this case, the jury returned a verdict in favour of NTP. The damages set in court were over \$ 50 million and it put the release of blackberry phones in jeopardy. RIM appealed the findings of the court and the injunction was stayed by the court. Then, in 2005, during the pendency of the appeal, NTP and RIM sought to settle the case

for \$ 450 million, but negotiations broke down. Fraring injunction and the resulting loss of service to a large number of blackberry phones, the US Department of Justice filed a brief requesting the court to allow RIM to continue the blackberry services to users in the Federal Government. In early 2006, the Supreme Court refused to hear RIMs appeal and the request of the Department of Justice was rejected by the Department of Defense. By early 2006, RIM had announced that design around NTPs patents had been achieved and the new designs would be implemented if the injunction was to be enforced. However, RIM and NTP settled out of court for \$ 612.5 million. Thus, this case illustrates the importance of injunction in patent law and consequently the importance of the enforcement of patents.

Digital Transmission:

The latest technological advancement affecting the motion picture industry is digital transmission. Digital transmission is a new form of motion picture signal which is carried on airwaves, rather than through a cable (for television), or reels (for movie theaters), which makes the material much more vulnerable to pirating.

Cyber Squatting:

The issue of cyber squatting is an example of the voids that have been exposed in the present legal framework due to the advent of new technology. The term squatting is used to identify a person who is occupying a space not owned by him or

her and without the owner's permission. Similarly, a cyber squatter is one who has registered a domain name, or multiple domain names under his name knowing that other entities would pay far greater prices for the same domain names. In a virulent form, cyber-squatters disparage the person or corporation meant to be represented by the domain name to pressure the person or corporation to buy the domain. The traditional law to deal with squatters is the law of real property. However, over the internet, this law is not applicable. The issues of jurisdiction, applicable law and choice of forum also arise. Where is the domain name located over the internet? Which court lays claim of jurisdiction? One strand of jurisprudence has fixed the jurisdiction to the location of the server through which the name is registered. However, if this view is accepted, there still remains the issue of applicable law. The popular choice has sometimes been trademark law. While trademark law has proven to be sufficient in cases of direct "infringement" the result in greyer areas is uncertain. For example, in the US, law requires showing of mala fide with respect to squatters on domain names that are similar to but not same as the trademark. However, it is obvious that this area would benefit greatly with an enactment on law relating to cyber squatting.

Developing Countries' Unwillingness to Enforce IP Laws:

There are many reasons as to why developing countries are often less than enthusiastic about enforcing their IP laws. The more pertinent reasons include:

(i) a lack of administrative resources - developing countries are simply unable to afford the cost of setting up the necessary complex administrative infrastructure;

(ii) the cost-benefit tradeoffs - the cost of protecting IPRs is initially borne domestically but the benefits initially accrue principally to foreign IPR-holders, and whatever benefits accrue domestically are initially far exceeded by the cost of enforcement;

(iii) the need for economic growth and to protect domestic industry - developing countries often perceive that enforcing foreign IPRs too strictly will dampen domestic economic growth by diverting limited resources to non-economic activity, and that exposing infant domestic industries to larger and more business-savvy foreign corporations will destroy them or hamper their development;

(iv) cultural differences - many developing nations differ from Western nations in their approach to copyright issues, i.e. not all ideas that are considered protected in the West are necessarily considered protected elsewhere. In fact, in India, knowledge that was heretofore considered public, such as “traditional knowledge” regarding Indian herbs and spices, has of late been in danger of being patented by American institutions that know Indian herbs and spices are marketable and know that no Indian entity has patented said herbs and spices due to the variance in IP cultures.

The Indian Position:

India, being poor, has historically had generally lax law enforcement, with very few resources devoted towards preventing IP theft. However, over the years, the Indian government has made a concerted effort to crack down on intellectual property piracy. As India's own IT industry began to take off, the incentive to protect intellectual property began to override the desire for cheap IP products. By the year 2005, India had eliminated import tariffs on computers to facilitate better trade. Moreover, India ranked third in the world in terms of biodiversity and thus had a strong incentive to protect its natural heritage. It is noteworthy that India extends the same copyright protections to foreign works as it does to domestic works. [S. 40(a), Copyright Act, 1957]

Modernization of Intellectual Property Administration

System: The protection of intellectual property rights in India continues to be strengthened. There is a well-established statutory, administrative and judicial framework to safeguard rights, whether they relate to patents, trademarks, copyright or industrial designs. The Indian Trademarks Law has been extended through court decisions to service marks in addition to trade marks for goods. Computer software companies have successfully curtailed piracy through court orders. Computer databases have been protected. The courts, under the doctrine of breach of confidentiality, accorded an extensive protection of trade secrets.

The Indian judiciary is seized of the matter of delay in administering justice and is handling cases as expeditiously as possible. Further, provisional measures, such as injunctions and 'Anton Piller' orders, are available through the Indian courts to stop infringement and to contain any damages.

Two projects were recently implemented by the Government for the modernization of patent information services and trademarks registry. These have led to a computerized Indian Patent Database and upgrading and mechanization of procedures relating to collection, retrieval and dissemination of patent information. The Trade Marks registry has been enhanced by modernizing and streamlining trade marks registration procedures, creating posts of electronic data processing personnel and organizing awareness programs.

The Government has also taken a number of measures to strengthen the enforcement of copyright law. Notably, the constitution of a Copyright Enforcement Advisory Council (CEAC) has taken place, and separate cells in state police headquarters created. The Government also initiates a number of seminars/workshops on copyright issues, for enforcement personnel as well as representatives of industry organizations.

However, the WIPO Copyright Treaty, 1996 and the WIPO Performances and Phonograms Treaty, 1996 have not yet come into force as the requisite number of countries have

not yet ratified or acceded to the treaties. India has also not yet acceded to the treaties.

It may be observed that the Indian Copyright Act is fully compatible with the Berne and the Berne provisions included in the TRIPS. The 1994 amendment to the Act of 1957 provides protection to all original literary, dramatic, musical and artistic works, cinematography films and sound recordings. The most recent changes bring sectors such as satellite broadcasting, computer software and digital technology under Indian copyright protection.

The Indian law also includes the world's most extensive provisions on "compulsory licensing." Generics firms can legally copy patented drugs for export to the least-developed countries, which lack domestic manufacturing capability.

The most recent case on intellectual property in India is that of *Novartis v. Union of India* (W.P. No. 24759 of 2006, decided on: 06.08.2007). This case arose due to the company's efforts to obtain an Indian patent on Gleevec, the company's brand-name version of imatinib mesylate. Gleevec (spelled Glivec outside the United States) is used to treat chronic myeloid leukemia, and Novartis has patented the drug in 35 countries. The protesters also decried the drug's high price.

The Novartis lawsuit is the first legal challenge to the most controversial safeguard, a provision against “evergreening” that targets attempts to patent minor improvements to old drugs. Section 3(d) of India’s Patents Act forbids the patenting of derivative forms of known substances (e.g., salts, polymorphs, metabolites, and isomers) unless they are substantially more effective than the known substance. Neither the Indian patent statute nor its implementing rules define “efficacy.” They give the patent office no guidelines for applying the new test. Novartis has asked the Chennai High Court to strike down this section as inconsistent with the WTO’s Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). TRIPS requires that patentable inventions be new and involve an “inventive step.” Novartis contends that TRIPS gives WTO members the option of providing patent rights more generous than these basic criteria would mandate but does not allow members to go in the opposite direction by implementing stricter requirements for obtaining a patent. The counterargument is that TRIPS does not define “inventive step.”

In August 2007, the Maras High Court refrained from determination whether India’s patent law stands in violation of the TRIPS and denied petitioner’s argument that the law is unconstitutional as vague, arbitrary and in violation of Article 14 of the Indian Constitution. The court, however, did not decide on the compatibility of the Indian Law with TRIPs, and instead asked the Petitioners to approach the WTO’s dispute settlement mechanism for appropriate remedy. It was held thus:

“[W]e have no difficulty at all [in finding] that Article 64 of “TRIPS” read with [the] World Trade Organisation’s understanding on Rules and Procedures governing the settlement of disputes provides a comprehensive settlement mechanism of any dispute arising under the [TRIPS]. Article 3 of the Rules declares that the dispute settlement system of the World Trade Organisation is to provide security and predictability to the multilateral trading system.”

Thus, “[w]hen such a comprehensive dispute settlement mechanism is provided ... and when it cannot be disputed that it is binding on the member States, we see no reason at all as to why the petitioner [Novartis], which itself is a part of that member State, should not be directed to have the dispute resolved under the dispute settlement mechanism [of the WTO]. ... When [the] participating Nations... decide that every participating nation shall have a Common dispute Settlement Mechanism, we see no reason why we must disregard it... Since we have held that this court has no jurisdiction to decide the validity of the amended section [xx] being in violation of Article 27 of “TRIPS”, we are not going into the question whether any individual is concerned with an enforceable right under “TRIPS” or not. For the same reason, we also hold that we are not deciding [the] issue... whether the amendment section is compatible o Article 27 of “TRIPS” or not.”

The Gleevec challenge is the latest controversy facing India since its January 1, 2005, implementation of substantially

enhanced patent protection for pharmaceuticals. India's membership in the World Trade Organization (WTO) means that for the first time in 35 years, drug products (the pharmaceutical compositions themselves, rather than merely the processes for making them) must be considered potentially patentable in India. The Indian government supports the expanded availability of patent protection as a catalyst that may enable India's enormous drug-manufacturing sector to evolve from reverse engineering to innovation.

Conclusion:

Comprehensive enforcement of IPR will, among other things, attract greater sources of global funding. With more sources of funding comes better organizational practices, as companies are unlikely to invest in poorly managed business organizations. Higher managerial standards combined with better IPR enforcement will attract foreign business.

Likewise, within the entertainment industry, uniform enforcement of intellectual property law will encourage greater levels of creativity, enhance legitimate means of conducting business, and most importantly, enable the entrance of foreign customers, thus expanding the industry. Pursuing this strategy will take the Indian entertainment industry along the lines of the Indian IT industry - it would become a globally-competitive outsourcing destination for the entertainment arts and sciences.

Of course, all property protection relies on government support. But because of intellectual property's non-rival features, its ease of propagation in the digital age, and its intangible form, enforcement of copyright and patent laws relies heavily upon social goodwill. One of the more interesting strategies used by information-based corporations in recent years has been the use of educational efforts aimed at creating a new intellectual property morality. Education efforts have focused on convincing the public that information property is like any other form of private property and that stealing it is both against the law and morally wrong. Conceptual differences between tangible and intangible property make the development of an intellectual property morality against piracy particularly arduous, especially in light of the current rash of litigation seeking strong enforcement of intellectual property rights.

As Judge Alex Kozinski has noted, in his dissenting opinion in *White v. Samsung Electronics America, Inc.*, [989 F.2d 1512, 1516 (9th Cir. 1993)], “[I]ntellectual property law is full of careful balances between what’s set aside for the owner and what’s left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright’s idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; the nominative use doctrine in trademark law; the right to make soundalike recordings. All of these diminish an intellectual property owner’s rights. All let the public use something created

by someone else. But all are necessary to maintain a free environment in which creative genius can flourish.”

The more important question, however, is the future of intellectual property law. Instead of vigorous enforcement of and litigation over intellectual property rights, increased emphasis should be placed on the utilitarian goals of the intellectual property system-the encouragement of innovation-particularly on an international level. There will be no effective enforcement of intellectual property rights-where necessary and important for innovation advances-without international agreement. And there will be no true international consensus on the enforcement of intellectual property rights until the West gives sufficient incentives to the developing world to join the international intellectual property regime. This is the next great challenge in intellectual property law.

Digital property presents the same basic challenges as other forms of intellectual property, but at unprecedented levels of complexity. The ease with which digital property can be located, accessed, copied, modified, and distributed is utterly without precedent. As we move further into the Internet age, it is clear many questions of law will arise. The issues of what constitutes infringement; what actions create jurisdiction; what law should be applied; and when should domestic law be applied abroad will undoubtedly come before the courts. However, the seriousness of these questions would be lessened if similar intellectual property laws were established around the world.